Court File No.

ONTARIO
SUPERIOR COURT OF JUSTICE
(Divisional Court)

BETWEEN:

EARTHROOTS COALITION,
CANADIAN ENVIRONMENTAL LAW ASSOCIATION, FEDERATION OF ONTARIO NATURALISTS carrying on business as ONTARIO NATURE, MICHEL KOOSTACHIN, and COOPER PRICE, a minor by his litigation guardian ELLIE PRICE

Applicants

- and –

HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO as represented by the MINISTER OF ENVIRONMENT, CONSERVATION AND PARKS and the MINISTER OF MUNICIPAL AFFAIRS AND HOUSING

Respondents

NOTICE OF APPLICATION TO DIVISIONAL COURT FOR JUDICIAL REVIEW

TO THE RESPONDENTS:

A LEGAL PROCEEDING HAS BEEN COMMENCED by the Applicants. The claim made by the Applicants appears on the following pages.

THIS APPLICATION for Judicial Review will come on for a hearing before the Divisional Court on a date to be fixed by the Registrar at the place of hearing requested by the Applicants. The Applicants request that this application be heard at Osgoode Hall, 130 Queen Street West, Toronto, Ontario, M5H 2N5.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or an Ontario lawyer acting for you must forthwith prepare a notice of appearance in Form 38A prescribed by the Rules of Civil Procedure, serve it on the Applicants' lawyer or, where the Applicants do not have a lawyer, serve it on the Applicants, and file it, with proof of

service, in the office of the Divisional Court, and you or your lawyer must appear at the hearing.

IF YOU WISH TO PRESENT AFFIDAVIT OR OTHER DOCUMENTARY EVIDENCE TO THE COURT OR TO EXAMINE OR CROSS-EXAMINE WITNESSES ON THE APPLICATION, YOU OR YOUR LAWYER MUST, IN ADDITION TO SERVING YOUR NOTICE OF APPEARANCE, SERVE A COPY OF THE EVIDENCE ON THE Applicants' lawyer or, where the Applicants do not have a lawyer, serve it on the Applicants, and file it, with proof of service, in the office of the Divisional Court within thirty days after service on you of the Applicants' application record, or not later than 2 p.m. on the day before the hearing, whichever is earlier.

IF YOU FAIL TO APPEAR AT THE HEARING, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

Date: August___, 2020 Issued by_____

Registrar
Divisional Court
Superior Court of Justice
Osgoode Hall
130 Queen Street West
Toronto, Ontario M5H 2N5

TO: The Honourable Jeff Yurek
Minister of Environment, Conservation and Parks
c/o Legal Services Branch
Ministry of the Environment, Conservation and Parks
135 St. Clair Avenue West, 10th Floor
Toronto, Ontario M4V 1P5
Attention: Mr. Tom McKinlay, Director (Acting)

AND TO: The Honourable Steve Clark
Minister of Municipal Affairs and Housing
c/o Legal Services Branch
Ministry of Municipal Affairs and Housing
777 Bay Street, 16th Floor
Toronto, Ontario M7A 2J3
Attention: Mr. Jeff Schelling, Legal Director

AND TO: Attorney General of Ontario
Crown Law Office – Civil
8th Floor, 720 Bay Street
Toronto, Ontario M7A 2S9
Attention: Mr. Sean Kearney, Director

APPLICATION

This is an application for judicial review of a statutory decision by two Ministers of the provincial Crown (the "Decision") that denied the Applicants and other members of the public their legal right to be notified and consulted on environmentally significant legislative amendments contained in Bill 197 (*COVID-19 Economic Recovery Act, 2020*) before they were enacted by the Ontario Legislature on July 21, 2020. These amendments include regressive changes to the *Environmental Assessment Act*, RSO 1990, c.E.18 ("*EAA*") contained in Schedule 6 of Bill 197, a purported amendment to the *Environmental Bill of Rights, 1993,* S.O. 1993, c. 28 ("*EBR*") contained in Schedule 6 of Bill 197, and additional changes to the *Planning Act*, RSO 1990, c.P.13 contained in Schedule 17 of Bill 197.

The Decision consists of three inter-related acts or omissions:

(1) the failure or refusal of the Minister of Environment, Conservation and Parks (the "Respondent MECP") and the Minister of Municipal Affairs and Housing (the "Respondent MMAH") to comply with Part II of the *EBR*, which, *inter alia*, imposes a mandatory duty on both Respondents to give notice to, and consult with, the public on environmentally significant proposals, such as Acts, <u>before</u> they are implemented;

(2) the Respondent MECP's erroneous interpretation of, and unreasonable reliance upon, a proposed amendment to the *EBR*

contained in Schedule 6 of Bill 197 that purported to dispense with the need to comply with Part II of the *EBR* in relation to the *EAA* changes; and

(3) the Respondents' failure or refusal in the exercise of their statutory power in enacting amendments to, and removing existing provisions from, the *EAA* to comply with international law conventions, principles, and norms on environmental assessment, public participation, and human rights applicable in Ontario.

The Applicants challenge the Decision as incorrect in law or, alternatively, procedurally and substantively unreasonable in the circumstances because: (i) it constituted a failure or refusal to comply with Part II of the *EBR*; (2) it relied on a proposed amendment to the *EBR* contained in Bill 197 at a time when it did not have the force of law and; (3) it shielded from public scrutiny the question of whether the *EAA* amendments complied with international law principles. The Respondents were obligated pursuant to international law conventions Canada has ratified, as well as by international law norms and principles pertaining to environmental assessment, human rights, and rights of public participation that are part of Canadian law: (1) to ensure that there was prior public consultation on the *EAA* amendments; and (2) to enact an *EAA* that meets these international environmental assessment, public participation, and human rights norms. The revocation of certain environmental assessment requirements in Schedule 6,

and the imposition of others provisions inconsistent with these principles, and without prior public consultation, constituted a breach of Ontario's legal obligations.

1. The Applicants make application for:

(a) an order declaring that the Decision contravened the mandatory requirements of Part II of the *EBR* by failing or refusing to notify and consult the public before major amendments to the *EAA*, the *Planning Act*, and the *EBR* were enacted in Bill 197, and, therefore, was made without legal authority and is of no force or effect;

(b) an order in the nature of certiorari quashing or setting aside the Decision due to the Respondents' contravention of the requirements of Part II of the *EBR* in failing or refusing to notify and consult the public before major amendments to the *EAA, Planning Act*, and the *EBR* were purportedly enacted in Bill 197;

(c) in the alternative, an order in the nature of mandamus directing the Respondents to undertake public consultation on the *EAA* and *Planning Act* amendments in Bill 197, before they are proclaimed in force or before proceeding with any regulations or guidelines implementing the amendments, in accordance with the requirements of Part II of the *EBR*, including the section 15 obligation to consult the public;

(d) an order declaring that the Decision, in enacting the Schedule 6 *EAA* amendments, is, in whole or in part, non-compliant with international law conventions, principles, and norms on environmental assessment, public participation, and human rights applicable in Ontario, including those enjoyed by Applicants Koostachin and Price;

(e) an order expediting the hearing of this application;

(f) an order extending the time for filing this application with the Court pursuant to section 5(2) of the *Judicial Review Procedure Act*, R.S.O. 1990, c. J.1, if necessary;

(g) an order requiring the Respondents to pay the Applicants costs of this Application if requested or, in the alternative, an order that all parties shall bear their own costs;

(h) such further or other relief, including an interim order if requested, as counsel may advise and this Honourable Court may permit.

Grounds for the Application

2. The Grounds for the application are:

The Parties

(a) The Applicant Earthroots Coalition ("Earthroots") with 12,000 supporters across Canada: (i) is a federally incorporated non-profit organization dedicated to the conservation of wilderness, wildlife, and watersheds in Canada, with a focus on Ontario; (ii) conducts research, educates, and engages in other activities to protect northern Ontario's forests from overharvesting, southern Ontario's watersheds, wildlife habitat, and prime near-urban agricultural land from urban sprawl, Ontario's parks and protected area public lands from sport hunting, mining, and road expansion, and Ontario's species from extinction due to threats posed by habitat loss and climate change; and (iii) was denied the opportunity to comment on Bill 197 by the conduct of the Respondents MECP and MMAH in failing or refusing to post the Schedule 6 *EAA* amendments and *EBR* amendment, and the Schedule 17 *Planning Act* amendments, on the Environmental Registry for comment or making their members aware of them by other means and giving them an opportunity to comment;

(b) The Applicant Canadian Environmental Law Association ("CELA"): (i) is a federally incorporated non-profit organization and specialty legal aid clinic funded by Legal Aid Ontario that represents in proceedings under the *EAA*, the *Planning Act*, and *EBR* low-income Ontarians, disadvantaged communities, and vulnerable populations experiencing environmental harm or risk; (ii) has 50 years of extensive experience and interest in providing comments to, or appearing before, government bodies, legislature committees, administrative tribunals, and

the courts, regarding activities, undertakings, practices, or reforms in connection with the *EAA*, the *Planning Act*, and the *EBR*; and (iii) was denied the opportunity to comment on Bill 197 by the conduct of the Respondents MECP and MMAH in failing or refusing to post the Schedule 6 *EAA* and *EBR* amendments, and the Schedule 17 *Planning Act* amendments, on the Environmental Registry for comment;

(c) The Applicant Federation of Ontario Naturalists carrying on business as Ontario Nature ("Ontario Nature"): (i) is a non-profit conservation organization dedicated to protecting wild species and wild spaces through conservation, education, and public engagement and represents more than 30,000 members and supporters, and more than 150 member groups across Ontario; (ii) administers a wide variety of programs, including an endangered species recovery program, a conservation program for northern Ontario forests and habitats, a natural areas and landscapes program to address increasing pressures in southern Ontario due to population growth, development, and climate change, and a nature reserves program designed to protect imperiled and vulnerable significant natural and biodiverse areas and habitats; (iii) has an extensive history of involvement in both environmental assessment and land use planning matters both at the law reform level and in relation to specific projects; and (iv) was denied the opportunity to comment on Bill 197 by the conduct of the Respondents MECP and MMAH in failing or refusing to post the Schedule 6 *EAA* amendments, and the Schedule 17 *Planning Act* amendments, on the Environmental Registry for comment or

making its members aware of them by other means and giving them an opportunity to comment;

(d) The Applicant Michel Koostachin: (i) is a Cree community member from Attawapiskat First Nation in Treaty 9 territory and has lived and worked throughout northern Ontario and in fly-in Indigenous communities; (ii) is concerned about the proposed Ring of Fire mining projects and related road development in the area and is founder of the community-led Friends of the Attawapiskat River; (iii) fears that these projects and other development in the territory will interfere with and impede his traditional practices, including access to lands for ceremonial purposes and harvesting of traditional foods and medicines, cause adverse impacts on the area's land, water, and wildlife, will be contrary to the Cree cultural perspective that we be mindful of those yet born, and risks harm to human health from potential release of toxic substances from mining activity, thereby threatening his human rights; (iv) is concerned amendments to the *EAA* contained in Bill 197 will make it easier for these projects to be approved without adequate environmental assessment of their impacts or opportunity for public comment or objection; (v) was denied the opportunity to comment on Bill 197 by the conduct of the Respondent MECP in failing or refusing to post the Schedule 6 *EAA* amendments on the Environmental Registry for comment or making members of this remote community aware of them by other means and giving them an opportunity to comment; and (vi) is concerned that the Respondents proceeded with these measures contrary to their obligations with

regard to the Applicant's rights under the *United Nations Declaration on the Rights of Indigenous Peoples*, including Articles 1, 7, and 32;

(e) The Applicant Cooper Price, a minor by his litigation guardian Ellie Price ("Cooper Price"): (i) is a grade 11 student, under the age of 18 years, living in Toronto who is active in environmental and climate change issues in his community, regionally, and nationally through various organizations he is a member of, or through which he takes a leadership role; (ii) is distressed about, and fearful of, a future that will be greatly diminished for him and his peers because of governmental decisions being taken now that pose potential harm to his life and health because they are insufficiently protective of the environment generally, and the climate system, in particular; (iii) is concerned that upon learning of the existence of the Bill 197 amendments to the *EAA* that they would not be the subject of prior public consultation before being enacted and that this governmental decision deprived him of his right to comment on such an environmental significant decision; (iv) is concerned that the results of such a decision and the changes contained in the *EAA* amendments will allow projects to proceed in future in Ontario that do not protect his rights to life and health and that are disruptive of the environment generally, and the climate system, in particular; and (v) is further concerned that the Respondents employed a process in passing these amendments, and included content in the measures themselves, that are contrary to their obligations with regard to the Applicant's rights under

the *Convention on the Rights of the Child*, including Articles 2-4, 6, 12, 14, and 24;

(f) The Applicants have brought this application because: (i) each has been denied the legal right under the *EBR* to receive notice from, and provide comment to, the Respondents on the *EAA*, *Planning Act*, and *EBR* amendments in Bill 197 before they were enacted; (ii) each of the non-governmental organization Applicants operate one or more programs designed to protect the environment, use or rely on these laws, as do their members, supporters, or clients, to protect the environmental interests these programs seek to further, and fear their environmental interests and those of their members, supporters, or clients, as the case may be, will be substantially prejudiced by the operation of the amendments to the *EAA* and the *Planning Act* adopted as part of Bill 197 for which they were not given notice of, or an opportunity to comment upon, under the *EBR*; (iii) each of the individual Applicants has an interest in protection of the environment and fear their rights to life and security of the person concerning their environmental interests will be substantially prejudiced by the operation of the amendments to the *EAA* and the *Planning Act* adopted as part of Bill 197 for which they were not given notice of, or an opportunity to comment upon, under the *EBR*; and (iv) each has, in the alternative, public interest standing to bring this application;

(g) The Respondent MECP administers both the *EBR*, Ontario's primary statute for facilitating public participation in environmental decision-making by

the provincial government, and the *EAA*, Ontario's primary statute for protecting, conserving, and managing the environment in the public interest by examining the effects of, and making informed decisions on, undertakings by the public and private sector on the natural environment, human life, and social, economic, and cultural conditions in the province;

(h) The Respondent MMAH introduced Bill 197 and oversaw its passage in the Ontario Legislature, and administers the *Planning Act*, Ontario's primary statute for controlling municipal land use, growth, and development across the province.

The Purposes of the *EBR* and What Part II Requires

(i) Section 2 of the *EBR* establishes broad environmental protection purposes, including the right to a healthful environment through means provided in the Act, and identifies measures by which the purposes are to be fulfilled, such as through the participation of Ontario residents in the making of environmentally significant decisions by the provincial government, and increased government accountability for its environmental decision-making. The key provisions of the *EBR*, summarized below, demonstrate an intention that these provisions enjoy a rights-based status in Ontario;

(j) Section 3(1) states that Part II of the *EBR* "sets out minimum levels of public participation that must be met before the Government of Ontario makes

decisions on certain kinds of environmentally significant proposals for…Acts…", including proposals to pass, amend, revoke or repeal Acts, as authorized by section 1(2);

(k) Section 11 requires prescribed Ministers "take every reasonable step to ensure that the ministry statement of environmental values [produced pursuant to sections 7-9 of the *EBR*] is considered whenever decisions that might significantly affect the environment are made in the ministry";

(l) The *EBR Statement of Environmental Values* ("SEV") of the Respondent MECP in force at the time of the Decision commits to applying the following principles when developing Acts:

(i) adopt the ecosystem approach to environmental protection;

(ii) consider cumulative effects on the environment;

(iii) consider effects of its decisions on current and future generations consistent with sustainable development principles;

(iv) use a precautionary, science-based approach to decision-making to protect human health and the environment;

(v) prioritize pollution prevention;

(vi) apply the polluter pays principle;

(vii) rehabilitate the environment when harm is caused;

(viii) encourage increased transparency and on-going engagement with the public as part of its environmental decision-making;

(ix) document how the SEV was considered each time an Act is posted on the Environmental Registry established under section 5 of the *EBR*;

(x) because "public consultation is vital to sound environmental decision-making…provide opportunities for an open and consultative process when making decisions that might significantly affect the environment";

(m) The *EBR* SEV of the Respondent MMAH in force at the time of the Decision commits to applying the following principles when developing legislation:

(i) apply the purposes of the *EBR* when making decisions that might significantly affect the environment, including as it develops Acts;

(ii) build and maintain strong relationships with municipal governments through the sharing of governance tools and innovative ideas for environmentally-responsible decision-making;

(iii) support a land use planning system that promotes environmentally sustainable, complete communities; support green space; natural heritage and water quality and quantity; ensure wise management, conservation and use of natural resources; and protection of public health and safety;

(iv) document how the SEV was considered each time a decision on an Act is posted on the Environmental Registry;

(v) provide opportunities for an open and consultative process when making decisions that might significantly affect the environment;

(vi) ensure its responsibilities under the *EBR* are implemented and will strive to ensure that its use of the Environmental Registry continues to allow the public to participate and be informed;

(vii) recognize the importance of communicating significant decisions with the public through the Environmental Registry, and continue to use the Environmental Registry as one of its primary public consultation tools; and

(viii) continue to apply its SEV in environmentally significant decisions;

(n) Section 14 requires prescribed Ministers, in determining whether, under section 15 of the *EBR*, an Act, if implemented, could have a significant effect on the environment, to consider the following factors:

(i) extent and nature of the measures that might be required to mitigate or prevent any harm to the environment that could result from a decision whether or not to implement the Act;

(ii) geographic extent (local, regional, provincial) of any harm to the environment that could result from a decision whether or not to implement the Act;

(iii) nature of the private and public interests, including governmental interests, involved in the decision whether or not to implement the Act;

(o) Section 15(1) requires prescribed Ministers, if they consider that an Act could, if implemented, have a significant effect on the environment and the public should have an opportunity to comment on the proposal before implementation, to do everything in their power to give notice of the proposal to the public at least 30 days before it is implemented;

(p) Sections 17(1)(2) and 8(6) require prescribed Ministers to consider allowing more than 30 days of public consultation between notice of a proposal for an Act under section 15 and implementation of the proposal based on certain factors, including:

(i) complexity;

(ii) level of public interest;

(iii) period of time the public may require to make informed comment;

(iv) any private or public interest, including any governmental interest, involved;

(q) Sections 27(1) to (3) require notice of a section 15 proposal for an Act to be posted on the Environmental Registry and by other means prescribed Ministers consider appropriate, and must include a description of the proposal, a statement of how and by what date the public may participate in decision-making on the proposal (including a description of the right to submit written comments), where and when the public may review written information about the proposed Act, an

address where members of the public may submit their written comments and questions about their rights as members of the public to participate in decision-making on the proposal;

(r) Sections 30(1) to (3) allow prescribed Ministers to exempt a proposal for an Act from section 15 where they conclude that another public participation process has already occurred "that was substantially equivalent to the process required" under the *EBR*, and requires prescribed Ministers to give notice to the public and to the Auditor General as soon as reasonably possible after the decision is made and must include a brief statement of their reasons for the decision;

(s) Sections 35 to 36 require that where prescribed Ministers have complied with section 15 of the *EBR* and provided notice and comment opportunities to the public respecting a proposed Act, they are also required to consider the public comments received in deciding on the proposal and provide reasons explaining the effect, if any, of the comments on the decision;

(t) Section 2 of the *General Regulation* (O. Reg. 73/94) under the *EBR*, prescribes both the Respondents MECP and MMAH for the purposes of section 15 of the *EBR* in relation to proposals for Acts.

The Purposes of the *EAA* and the *Planning Act* and What They Required Before Bill 197

(u) Both the *EAA* and the *Planning Act* are laws with significant implications for the human and natural environments because they can: (i) avoid, minimize, or mitigate adverse impacts of public and private sector activities; (ii) prevent disproportionate impacts on vulnerable communities and ecosystems; and (iii) ensure public participation and accountability in their respective decision-making processes;

(v) The *EAA*: (i) is aimed at ensuring the "betterment" of the people of Ontario by protecting, conserving and wisely managing the environment; (ii) is designed to establish a planning and information-gathering process to identify and assess the effects of undertakings on the natural and human environment before they are implemented; (iii) is applicable to all public sector undertakings (activities, programs, proposals, plans) unless they are exempted, and to private sector undertakings designated as "major"; (iv) establishes minimum content for an environmental assessment, such as the need for, alternatives to, and impacts of, undertakings, although these requirements may be modified by the Minister; (v) sets out whether, and if so how, classes of activities may be subject to a specific environmental assessment regime that will govern how all activities within the class shall be carried out thereafter without further assessment; (vi) identifies the circumstances when an undertaking that is subject to a class environmental assessment may become subject to an individual or full environmental

assessment; (vii) identifies the process for making decisions on the adequacy of an environmental assessment and whether an undertaking should be approved; and (viii) sets out the procedural rights that allow members of the public to become involved in various stages of the process;

(w) The *Planning Act*: (i) is aimed at promoting sustainable economic development in a healthy natural environment, and recognizing the decision-making authority and accountability of municipal councils in planning; (ii) is intended to regulate the private and public use of land and buildings in order to resolve conflicts between private and public interests; (iii) establishes a regime for controlling the use of land, including official plans, zoning by-laws, subdivision control, site plan control, and demolition control; (iv) allows opportunities for public hearings to resolve disputes on whether land use changes should occur and, if so under what conditions; and (v) sets out the circumstances where ministerial zoning orders may be issued without public involvement or hearings;

(x) Accordingly, preventing members of the public from meaningfully participating in the decision-making processes used by the MECP and the MMAH to determine what the *EBR*, *EAA*, and *Planning Act* will and will not require in the future (as occurred in connection with Bill 197), carries serious implications for environmental protection, public health and safety, and the rule of law, including international law conventions, norms and principles pertaining to human rights and rights of public participation that are part of Canadian law.

What Occurred in this Case

(y) On July 8, 2020, Bill 197 (*COVID-19 Economic Recovery Act, 2020*), was tabled by the Respondent MMAH for First Reading in the Legislative Assembly of Ontario. Schedule 17 of Bill 197 contained amendments to the *Planning Act* in relation to ministerial zoning orders, while Schedule 6 of Bill 197 contained numerous amendments to the *EAA* as well as an unprecedented attempt to displace Part II of the *EBR* through a new "consequential amendment" to the Act. In particular, section 51(7) of Schedule 6 added new section 33.1 to the *EBR* that provided: "The requirements of [Part II] are deemed not to have applied with respect to the amendments made by Schedule 6 to the *COVID-19 Economic Recovery Act, 2020*";

(z) Section 66(1) of Schedule 6 of Bill 197 proposed that new section 33.1 of the *EBR* would go into effect immediately on the day that Bill 197 received Royal Assent. However, pursuant to section 66(2) of Schedule 6, section 51(8) of Schedule 6 proposed to repeal section 33.1 of the *EBR* 30 days after Bill 197 received Royal Assent;

(aa) On the same day Bill 197 was tabled in the Legislative Assembly of Ontario, the Respondent MECP posted a "bulletin" about Bill 197 on the Environmental Registry (ERO 019-2051) which stated that the notice was for informational purposes only as "there is no requirement to consult on this

initiative". The bulletin also noted that in order to expedite infrastructure projects to support recovery from the pandemic, the proposed amendments to Schedule 6 of Bill 197 "include a provision making them not subject to the minimum 30-day posting requirement under the [*EBR*]". However, this proposed provision was not in force when the bulletin was posted on the Environmental Registry;

(bb) The bulletin did not assert that the Schedule 6 changes were environmentally insignificant, but alleged that the proposed amendments to the long-standing *EAA* build on an April 2019 ministry discussion paper on "modernizing" Ontario's environmental assessment program, and a November 2018 "made in Ontario" environment plan. The Respondent MMAH did not post a bulletin, or any other posting, on the Environmental Registry about Bill 197 in general, or about the *Planning Act* changes regarding ministerial zoning orders in Schedule 17, in particular;

(cc) Schedule 6 of Bill 197 contained a number of environmentally significant changes that effectively amounted to a fundamental re-writing of the *EAA* regime. For example, the *EAA* amendments, *inter alia*, proposed to:

> (i) remove the automatic application of *the EAA* to public sector undertakings, to be replaced by Cabinet discretion to list by future regulation which projects are (or are not) subject to the Act;

(ii) terminate the 10 currently approved class environmental assessments, to be replaced with yet to be determined “streamlined” environmental assessment requirements by regulation;

(iii) significantly restrict the grounds upon which the public can request that a streamlined environmental assessment of a contentious infrastructure project can be elevated (or “bumped-up”) by the MECP to a comprehensive environmental assessment;

(iv) terminate certain elevation requests that had been undecided by the MECP prior to the introduction of Bill 197;

(v) remove the application of section 21.2 (power to review) of the *Statutory Powers Procedure Act* with respect to decisions made under Part II of the *EAA*; and

(vi) expand regulation-making authority to exempt any person or undertaking (or classes of persons or undertakings) from any requirement under the *EAA*;

(dd) Despite the claim in the Environmental Registry bulletin that COVID-19 was the rationale for introducing and enacting the *EAA* amendments in Schedule 6 of Bill 197 without prior public consultation, the Respondent MECP advised the

Legislative Assembly on July 15, 2020 that his ministry had been working on the amendments for over a year and a half (that is, well before the advent of the pandemic);

(ee) On July 16, 2020, twelve non-governmental organizations, including the Applicants CELA and Ontario Nature, wrote to the Respondent MECP advising, *inter alia*, that: (i) posting of the *EAA* amendments for public comment was mandatory under section 15 of the *EBR*; (ii) there were no other exceptions to public participation rights under the *EBR* that were applicable to Schedule 6 of Bill 197; and (iii) he could not rely on the proposed new section 33.1 of the *EBR* – which had not yet been enacted or proclaimed into force – as the legal basis for exempting the *EAA* amendments from the consultation requirements of Part II of the *EBR*;

(ff) On July 21, 2020, Bill 197, the *COVID-19 Economic Recovery Act, 2020*, was given Third Reading and Royal Assent and new section 33.1 of the *EBR* then purportedly came immediately into force for 30 days;

(gg) On July 24, 2020, the Respondent MECP responded in writing to the twelve non-governmental organizations, including the Applicants CELA and Ontario Nature, and suggested three different *ex post facto* justifications for the Decision not to subject the *EAA* amendments to the mandatory public consultation requirements under section 15 of the *EBR*: (i) the pandemic necessitated swift

action to get the province's economic recovery "back on track"; (ii) the April 2019 discussion paper and November 2018 environmental plan, which described the government's overall vision for a modernized EA program, had been the subject of public consultation at the time they were released, respectively; and (iii) the retroactive exemption of Part II of the *EBR* contained in section 51(7) of the *EAA* amendments (adding section 33.1 to the *EBR*) was within the full legal authority of the Ontario legislature to make;

(hh) On or about August 19, 2020, the Applicant commenced the within application for judicial review.

What Should Have Happened

(ii) The introduction of Bill 197 on July 8, 2020, triggered mandatory statutory duties imposed by Part II of the *EBR* upon the Respondents MECP and MMAH to provide at least a 30 day public notice/comment period in relation to the proposed amendments to the *EAA*, *Planning Act*, and *EBR* contained within Schedules 6 and 17 of the Bill 197. Both Ministers fundamentally breached their legal duties on July 21, 2020 when Bill 197 was implemented (i.e. enacted and proclaimed into force) without the minimum 30-day public consultation expressly required by section 15 of the *EBR*;

(jj) Moreover, the Respondent MECP had no authority to invoke or rely upon the proposed section 33.1 of the *EBR* contained in the Schedule 6 *EAA* amendments because:

(i) section 15 of the *EBR* was in force at the time Bill 197 was introduced, and the proposed section 33.1 was not;

(ii) proposed section 33.1 itself should have been subject to public notice and comment under Part II of the *EBR* before it was enacted and proclaimed in force because it was not a mere "consequential" amendment but a frontal assault on the public participation purposes and rights entrenched in the *EBR*;

(iii) the ministry's April 2019 discussion paper on modernizing EA, and the November 2018 environmental plan, generally contained high-level conceptual discussions, broad "vision" statements, and non-committal policy suggestions that did not propose specific statutory language (and certainly did not propose section 33.1 of the *EBR*, or section 8 of Schedule 6 regarding new section 4.1 of the *EAA*);

(iv) for the purposes of Part II of the *EBR*, public review or comment on these earlier documents is not a reasonable or acceptable substitute for public consultations that were required by law pursuant to section 15 of the *EBR* in order to solicit feedback on the highly detailed legislative

particulars of the Schedule 6 *EAA* amendments, which entail specific (and fundamental) alterations of the *EAA* that were never publicly disclosed until Bill 197 was tabled for First Reading;

(v) since the discussion paper and the environmental plan predate the pandemic by a year or more, their generalized prescriptions for new directions in environmental assessment are neither informed by the pandemic, nor can they be relied on to justify the Respondent MECP's failure to comply with section 15 of the *EBR*;

(vi) the MECP's belated attempt to invoke its previous public consultation on the discussion paper and environment plan is inconsistent with the governmental proposal to enact section 33.1 of the *EBR*, which clearly recognizes that public notice/comment opportunities were legally required under Part II of the *EBR* in relation to the Schedule 6 changes to the *EAA*; and

(vii) Ontario legislation is required to comply with, and respect the values and principles of, international law, including conventions, principles, and norms which, for example, recognize and require citizens having the right to:

(A) participate in a process that allows them to provide their concerns to officials and legislators regarding proposed legislation

that may affect the environment, their right to life and other human rights dependent on a healthy environment, and to have such officials take these concerns into account in the finalization of such legislation;

(B) seek judicial review remedies when their rights to public participation have been violated; and

(C) protection from foreseeable environmental, and associated human rights, impacts through their national and sub-national (provincial) governments establishing, maintaining and using an environmental assessment regime that includes the appropriate use of environmental impact assessment, public participation and other procedures and substantive criteria consistent with, and required by, international covenants, treaties, principles and norms.

The Decision Violated Fundamental Administrative Law Principles

(kk) In making the Decision and circumventing Part II of the *EBR*, the Respondents MECP and MMAH erred in law, acted beyond or without jurisdiction, failed to take into account relevant considerations, took extraneous considerations into account, or otherwise acted unreasonably, because:

(i) there was a fundamental failure or refusal to comply with in force statutory preconditions set out in section 15 of the *EBR* to consult the

public before enacting the *EAA*, *Planning Act*, and *EBR* amendments contained in Schedules 6 and 17 of Bill 197;

(ii) there was undue and unlawful reliance upon what the Respondents labelled a proposed "consequential amendment" in Schedule 6 that was to add section 33.1 to the *EBR*, a provision that: (A) was not actually in force at the time that the Respondent MECP invoked it as the basis for bypassing or contravening the requirements of Part II of the *EBR* in relation to the *EAA* changes in Schedule 6 of Bill 197; (B) was itself unlawful insofar as there was no prior consultation as required under the *EBR* in respect of this *EBR* amendment; and (C) in any event, was not in pith and substance a "consequential" amendment but rather a major amendment to a rights-based statute;

(iii) on its face, new section 33.1 of the EBR is limited to the *EAA* changes in Schedule 6 of Bill 197, and does not extend or does not apply to the *Planning Act* changes contained in Schedule 17 of Bill 197; and

(iv) the Respondents failed or refused to comply with their own SEV commitments and principles (particularly those relating to public consultation), despite section 11 of the *EBR* that compels both Ministers to take every reasonable step to ensure their respective SEVs are considered

whenever environmentally significant decisions are being made, including decisions to pass or amend environmental or planning statutes.

The Decision Violated International Law, Conventions, Norms and Principles

(ll) Environmental assessment and public participation in environmental decision-making have risen to the level of civil, political, and human rights international law principles and norms, as well as being recognized in international conventions Canada has ratified and, as such, this body of international law is part of the law of Canada and Ontario;

(mm) The Decision violated the aforementioned international law principles:

(i) by failing or refusing to comply with Part II of the *EBR*;

(ii) by relying on the proposed section 33.1 of the *EBR* at a time when it was not in force;

(iii) by relying on the proposed section 33.1 of the *EBR* at a time when it was denying the Applicants and other members of the public their rights to participate through notice and comment regarding the environmentally significant amendments to the *EAA* contained in Schedule 6 of Bill 197; and

(iv) by relying on the proposed section 33.1 of the *EBR* to shield from public scrutiny Schedule 6 amendments that in enacting changes to, and removing existing provisions from, the *EAA*, failed to have regard to the

impact on the rights of the Applicants under internationally accepted principles on public participation, human rights, and environmental assessment applicable in Ontario.

International and Statutory Provisions

(nn) *Convention on Biological Diversity*, 5 June 1992, 1760 UNTS 69 (entered into force 29 December 1993, ratified by Canada 4 December 1992);

(oo) *Convention on Environmental Impact Assessment in a Transboundary Context* ("*Espoo EIA Convention*"), 25 February 1991, 1989 UNTS 309 (entered into force 10 September 1997, ratified by Canada 13 May 1998);

(pp) *Convention on the Rights of the Child*, 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990, ratified by Canada 13 December 1991);

(qq) *Courts of Justice Act*, R.S.O. 1990, c. C.43;

(rr) *Emergency Management and Civil Protection Act*, R.S.O. 1990, c. E.9 and O. Reg. 73/20;

(ss) *Environmental Assessment Act*, R.S.O. 1990, c. E.18;

(tt) *Environmental Bill of Rights, 1993*, S.O. 1993, c. 28 and O. Reg. 73/94;

(uu) *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976, accession by Canada 19 May 1976);

(vv) *Judicial Review Procedure Act*, R.S.O. 1990, c. J.1;

(ww) *Planning Act*, R.S.O. 1990, c. P.13;

(xx) *Ramsar Convention on Wetlands of International Importance*, 2 February 1971, 996 UNTS 245 (entered into force 21 December 1975, ratified by Canada 15 January 1981);

(yy) *Rio Declaration on Environment and Development*, 12 August 1992, 31 ILM 874;

(zz) *Rules of Civil Procedure*, R.R.O. 1990, Regulation 194;

(aaa) *United Nations Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters* ("*Aarhus Convention*"), 25 June 1998, 2161 UNTS 447 (entered into force 30 October 2001);

(bbb) *United Nations Declaration on the Rights of Indigenous Peoples*, 13 September 2007, A/RES/61/295;

(ccc) *United Nations Framework Convention on Climate Change*, 9 May 1992, 1771 UNTS 107 (entered into force 21 March 1994, ratified by Canada 4 December 1992);

(ddd) *United Nations Universal Declaration of Human Rights*, 10 December 1948, GA Res 217 A (III), UN Doc A/810;

(fff) *Paris Agreement*, 12 December 2015 (entered into force 4 November 2016, ratified by Canada 5 October 2016);

(ggg) Such further or other grounds as counsel may advise and this Honourable Court may permit.

Documentary Evidence

3. The following documentary evidence will be used at the hearing of the application:

(a) the record to be filed by the Respondents MECP and MMAH pursuant to section 10 of the *Judicial Review Procedure Act*, R.S.O. 1990, c. J.1;

(b) Affidavit of Gord Miller, to be sworn;

(c) Affidavit of Theresa McClenaghan, to be sworn;

(d) Affidavit of Caroline Schultz, to be sworn;

(e) Affidavit of Mike Koostachin, to be sworn;

(f) Affidavit of Cooper Price, to be sworn;

(g) Affidavit of Ellie Price, to be sworn;

(h) Such further or other material as counsel may advise and this Honourable Court may permit.

Date: August 19, 2020

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Court File No.

EARTHROOTS COALITION, et al v. **HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO**

Applicants Respondents

ONTARIO
DIVISIONAL COURT
SUPERIOR COURT OF JUSTICE

NOTICE OF APPLICATION TO DIVISIONAL COURT FOR JUDICIAL REVIEW

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